Opinion Letter of Acting General Counsel, Equal Employment Opportunity Commission, March 21, 1967. Released April 28, 1967.

In your letter you present the following fact situation:

Our client employs a substantial number of professional performers. These employees are represented by a labor organization as their collective bargaining agent. For many years the company and the union have enjoyed a harmonious and wholesome relationship.

The union has presented a proposal for adoption by the company which has caused the client much concern because it may be violative of the Civil Rights Act of 1964, particularly Sec. 703(a)(1) and (2). The union urges that the company agree that it maintain a policy of employing one citizen of the United States or one resident alien in the United States on each occasion that it employs a non-resident alien. The company's business is based upon the premise that it engages the world's greatest performers, and there has been public acceptance of this fact; consequently, the sole criteria used by the company in the hiring of its professional performers is the ability of the individual to perform, the uniqueness of the act, and the receptivity of the audience.

When the employees are engaged in a foreign country by our client, they are permitted to render their services in the United States by obtaining an H-1 Visa, granted to individuals with exceptional and unique talent. Although national origin is not the reason for employment, nevertheless, the historical fact is that the overwhelming proportions of new acts and per-

formers in this particular field have been and are non-resident aliens. As a general rule, the non-resident alien is employed in a foreign country and is then brought to the United States to perform his services; however, on occasion the non-resident alien may come to the United States for the purpose of seeking employment with our client and after his arrival, he may be employed by the company.

On the basis of the above facts you ask the following questions:

1. May a company and a union agree between themselves that for each non-resident alien who is employed outside of the country, employment must be given by the company to a citizen of the United States or a resident alien?

2. May a company and a union agree that for each non-resident alien who comes to the United States seeking employment with the company and is employed by the company after his entry into the United States, the company must hire a citizen of the United States or a resident alien?

Title VII of the Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. You present a situation in which the union has proposed that the company hire at least one United States citizen or resident alien for each non-resident alien that it hires. The company would, of course, be free to hire a greater proportion of United States citizens or resident aliens if it so desired. This proposal, by placing a quota limit on the employment of non-resident aliens, discriminates against this group as a class, and the question is whether such discrimination is consistent with Title VII. We conclude that it is.

It is evident that discrimination against non-resident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forebears came, see 110 Cong. Rec. 2549, not to whether or not he is a United States citizen, nor *a fortiori*, to whether, if an alien, he resides in or without the United States. It may be conceded that a limitation not specifically phrased in terms of national origin may nevertheless have the effect of unlawfully discriminating on the basis of national origin.[1] But where the discrimination is merely against non-resident aliens, it does not appear to us that the limitation is levelled at any particular national group, nor that it is even intended to benefit persons of a particular national origin, since citizens and resident aliens are equally the beneficiaries of the limitation.

Furthermore, it is not the policy of our law to grant to non-resident aliens as a class opportunities for employment on equal terms with citizens and resident aliens. Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor, see Immigration and Nationality Act, as amended, § 203, 8 U. S. C. 1153; 1965 U. S. Code Cong. & Adm. News, pp. 3333-34. Indeed, the non-resident aliens described in your letter may be admitted to this country for the purpose of employment only upon petition of the prospective employer and upon a showing that they are "of distinguished merit and ability" and are coming "to perform temporary services of an exceptional nature requiring such merit and ability," 8 U. S. C. 1101(a)(15)(H); 8 C. F. R. 214.2(h).

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1. Thus, we have previously concluded that an advertisement for "British-trained" or "British-educated" office help would be viewed as an expression of a preference based on national origin unless it could be demonstrated that the preference was in fact based on differences in the nature or quality of their training as opposed to that available in this country.

To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention. We conclude, therefore, that it is not an unlawful employment practice under Title VII of the Civil Rights Act for an employer or a labor organization, by collective bargaining agreements or otherwise, to discriminate against non-resident aliens, generally, and in favor of United States citizens and resident aliens.

In view of the above disposition, we do not reach the question whether the first exemption of section 702 of the Civil Rights Acts is applicable to contracts of employment entered into abroad for performance in the United States. We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin or regarding discrimination in favor of United States citizens and against resident aliens.

Finally, you ask whether there is a distinction under Title VII between a native-born citizen and a naturalized citizen. We prefer not to pass on such a question in the abstract, but we might point out that as a general proposition "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Schneider* v. *Rusk*, 377 U.S. 163, 84 S. Ct. 1187, 1189 (1964).

This is an opinion letter issued pursuant to 29 C. F. R. 1601.30.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners,

vs.

FARAH MANUFACTURING CO., INC.,

Respondent.

REPLY BRIEF FOR PETITIONERS

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INDEX

PAGE

I. Whether "national origin" discrimination should be limited to "ancestry" discrimination 1

II. Whether open discrimination against foreign nationals can be compensated for by the hiring of U.S. citizens with similar foreign ancestry 2

III. Whether the EEOC Guidelines on Discrimination Because of National Origin make respondent's practice unlawful 3

IV. Whether Farah's discrimination against aliens violates 42 U.S.C. § 1981 4

V. Whether there is a "contemporary public policy to protect aliens" 6

Certificate of Service 7

Cases cited:

Graham v. *Richardson*, 403 U.S. 365 (1971) 5
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) 5
In re Griffiths, —— U.S. ——, 93 Sup.Ct. 2851 (1973) 6
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 5
Sugarman v. *Dougall*, —— U.S. ——, 93 Sup.Ct. 2842 (1973) 6

Regulations:

29 C.F.R. §1601.30 3
35 Fed. Reg. 18692 (Dec. 9, 1970), 1 CCH Emp. Prac. Guide ¶4070.30 n.1 3
42 U.S.C. §1981 ..... 4, 5, 6
U.S. Const. Article 1, §8, cl. 4 5
U.S. Const. Article 1, §9 5

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REPLY BRIEF FOR PETITIONERS

This reply brief is subdivided in accordance with the five major headings used in both petitioners' and respondent's main briefs.*

I.

Whether "national origin" discrimination should be limited to "ancestry" discrimination.

Petitioners have argued that birthplace as well as ancestry is relevant to determining national origin, and that Farah's citizenship requirement is a form of national origin discrimination because it is so directly related to place of birth. The requirement gives a clear preference to persons of U.S. birth, who are automatically citizens, and imposes a special burden (the burden of going through the naturalization process) on persons of foreign birth. Respon-

* Please note that, by typographical error, the last two argument headings in Petitioners' main brief are both numbered "IV."

dent's brief simply ignores this aspect of a citizenship requirement, as if special burdens on the foreign born merely because of their place of birth were permissible under Title VII. Under respondent's view of Title VII, an employer could insist that a foreign born person satisfy any irrelevant requirement or could even refuse to hire all persons born outside the United States. This view, we submit, makes a mockery of both the language and purpose of Title VII's protection against national origin discrimination.

II.

Whether open discrimination against foreign nationals can be compensated for by the hiring of U.S. citizens with similar foreign ancestry.

Farah's claim that it is insulated from Title VII attack by the hiring of large numbers of Mexican-Americans has been fully dealt with in petitioners' main brief. For the record, however, we do note two factual errors in respondent's brief on this point.

First, at page 14, lines 10-11, Farah alleges, without citation to the appendix, that "a person of Mexican national origin" was hired in lieu of the petitioner, Mrs. Espinoza. The record does not support that claim. There is no credible evidence in the record regarding the nationality, ancestry or other origins of the persons hired in lieu of Mrs. Espinoza.

Second, at page 15, footnote 16, respondent concedes that it has hired an alien on at least one occasion, in violation of its supposedly firm policy, but alleges that this alien was a Mexican, thus ostensibly showing its concern for Mexicans. There is no evidence in the record to support any claim as to the nationality or ancestry of this alien

who was hired. Farah has consistently refused to provide any such information. Jt. App. 29, at ¶ 7.

III.

Whether the EEOC Guidelines on Discrimination Because of National Origin make respondent's practice unlawful.

Farah apparently does not deny that present EEOC Guidelines bar discrimination because of alienage. The company does, however, refer to an earlier Opinion Letter of the EEOC General Counsel, dated March 21, 1967, as supporting its position. It is important to note that Farah makes no claim that it was misled by this opinion or that it would otherwise be unfairly affected by any supposed change in EEOC policy. Careful examination of this Opinion Letter (reprinted at pp. A1-A4 of Brief for Respondent, and also at pp. 11-15 of the Brief of Mexican American Legal Defense and Education Fund, Amicus Curiae) shows that any such claim would be unfounded. The opinion letter is addressed to the issue of discrimination against *non-resident* aliens, as to whom quite different consideration apply than to *resident* aliens such as Mrs. Espinoza. The opinion letter clearly recognizes this distinction and expressly "reserve[s] any decision . . . regarding discrimination in favor of United States citizens and against resident aliens." In any event, there is no authority in law for Farah to place any reliance on this opinion letter. EEOC rules provide that such an opinion letter, issued pursuant to 29 C.F.R. §1601.30, is "issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s)." 35 Fed. Reg. 18692 (Dec. 9, 1970), 1 CCH Emp. Prac. Guide ¶4070.30 n.1.

IV.

Whether Farah's discrimination against aliens violates 42 U.S.C. § 1981.

Petitioner's main brief discusses 42 U.S.C. §1981, which is derived from the Civil Rights Act of 1866, as amended in 1870, to demonstrate Congress' longstanding concern for the employment rights of aliens. Respondent apparently concedes that this provision bars employment discrimination based on either race or alienage. Respondent also concedes that, at least so far as race discrimination is involved, the provision bars private discrimination as well as discrimination based on state action. However, respondent argues that when alienage discrimination is involved, as distinguished from race discrimination, the coverage of §1981 must be limited to state action situations.

This distinction between the scope of coverage of race discrimination and of alienage discrimination is not based on anything in the language of the statute itself. Rather respondent's argument is constitutionally based. As we understand it, respondent's argument is that the only constitutional bases of §1981 are the Thirteenth Amendment and the Fourteenth Amendment and neither of these justifies a bar to private discrimination against aliens. Under the Thirteenth Amendment respondent argues that only discrimination related to slavery may be prohibited. Under the Fourteenth Amendment respondent argues that only discrimination based on state action may be covered. Thus, respondent's position seemed to be that there is no constitutional authority for Congress to bar discrimination that is both against aliens and private.

Respondent's constitutional analysis is plainly wrong. First, there is substantial doubt as to the correctness of respondent's conclusion as to the scope of Congressional

authority under the Fourteenth Amendment. While it is clearly correct that the amendment itself only extends to state action, it is also clear that pursuant to the enforcement authorization of section 5 of the amendment Congress may reach somewhat beyond the confines of the amendment's prohibitions. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). However, we need not concern ourselves with that fine constitutional point in this case, for there is a more patent error in respondent's argument. When discrimination against aliens is involved, Congressional authority is not limited to the Thirteenth and Fourteenth Amendments. The Federal Congress has plenary authority to regulate immigration and naturalization. Art. 1, §8, cl. 4; Art. 1, §9; see, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 376-80 (1971). Pursuant to that authority Congress has traditionally and lawfully addressed itself to the employment status of resident aliens, and assuring the employability of aliens continues to be a subject of Federal legislation. See Brief for Petitioner, pp. 40-41. Article 1 of the Constitution thus provides an unquestioned source of authority for Congress to bar private discrimination against aliens.

Given this obvious source of Congressional authority to extend §1981's alien protection to private employment discrimination, the only bona fide issue regarding §1981 is whether Congress intended it to reach this discrimination. That issue, we submit, has been resolved by *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and by the long line of cases which have squarely established that the right "to make and enforce contracts" in §1981 was intended to bar private employment discrimination. See cases cited in Brief for Petitioner, p. 30 n. 30. Any attempt to artificially engraft a state action requirement onto §1981 when such is not constitutionally compelled, would simply be a replay of the issue in *Jones*.

In sum, Section 1981 plainly extends the right to aliens as such to be protected against certain enumerated forms of discrimination; judicial interpretation has clearly established that one of those enumerated forms of discrimination is private employment discrimination. Since there is ample Congressional power to grant this right, §1981 bars Farah's alienage discrimination.

V.

Whether there is a "contemporary public policy to protect aliens."

While respondent denies there is any trend toward protecting aliens, the most recent decisions of this Court, issued subsequent to the filing of petitioner's main brief, give further evidence of this trend. In *Sugarman* v. *Dougall*, —— U.S. ——, 93 Sup.Ct. 2842 (1973) and *In re Griffiths*, —— U.S. ——, 93 Sup. Ct. 2851 (1973), the Court upheld the rights of resident aliens to jobs and participation in the professions without automatic disqualification because of their noncitizen status. The basis of these decisions—that it is irrational and inconsistent with Fourteenth Amendment traditions of equality to engage in job discrimination against aliens—is applicable to Title VII as well.

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Certificate of Service

I HEREBY CERTIFY that three true and correct copies of the foregoing Reply Brief of Petitioners were served by mail upon Kenneth R. Carr, Esq., P.O. Box 9519, El Paso, Texas 79985, this ..... day of August, 1973.

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GEORGE COOPER